United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL 74-2243

United States Court of Appeals

For the Second Circuit

PATRICK DEMAURO,

Plaintiff-Appellee

against

CENTRAL GULF SS CORP.,

Defendant and Third Party Plaintiff-Appellee-Appellant,

against

INTERNATIONAL TERMINAL OPERATING CO. INC.,

Third Party Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE

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Cases Cited

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Statement

This case was tried before Judge John M. Cannella and a jury and a judgment was entered on a verdict in favor of the plaintiff, Patrick DeMauro in the sum of Two Hundred Thousand Dollars ($200,000.) against the defendant, and a judgment in favor of the Defendant and Third Party Plaintiff against the Third Party Defendant in the same amount. The judgment over against Third Party Defendant was amended to include counsel fees. Third Party Defendant made a motion for judgment not-

withstanding the verdict or, in the alternative, for a new trial, which motion was denied. Third Party Defendant appeals from the judgment entered and the denial of its motion.

Position of Plaintiff

Judge Cannella was correct in directing a verdict in favor of plaintiff on the grounds of unseaworthiness. There were no questions of fact for the jury to determine as to defendant's liability to plaintiff. The amount of the verdict was not excessive.

The Evidence as to Liability

This is an action to recover damages for personal injuries sustained by plaintiff, a longshoreman employed by third party defendant stevedore, while working on board defendant's shipowner vessel on March 31, 1971.

A tier of heavy cases not being handled or touched by anyone collapsed and fell on plaintiff. The tier was unstable. Its base or resting place was bundled pipe which was not even or flat, was unstable and sloped, did shift and change shape and was not suitable for the purposes intended, and the chocking or bracing of the cargo was inadequate to contain the cargo. These facts were uncontradicted at trial. At the end of the entire case, plaintiff's negligence claim was withdrawn and defendant withdrew its claim of contributory negligence on the part of the plaintiff.

A motion for a directed verdict in plaintiff's favor was made and was granted.

Plaintiff, DeMauro, testified that at the time of the accident he was working in Hatch #4 which was a double hatch with a temporary bulkhead fence separating #4

from #5 (19A, 49A). On the day before the accident, just before it was time to stop work they opened the hatch and brought down a hi-lo into the lower tween deck (19A, 67A). On the day of the accident, this hi-lo was being used to remove palletized cargo which was stowed in the afterend of #4 against the temporary bulkhead and ran athwartship across the hatch. There was bundled steel pipe on the offshore side of the hatch running fore and aft and beyond the hatch into #5. There were four wooden cases piled one on top of the other stowed on top of the pipe and were against the bulkhead fence (22A-24A, 49A-50A), leaning against the side of the ship (70A). The palletized cargo was stowed across the hatch up to the pipe and there was nothing between the palletized cargo and the pipe or cases (57A-58A). There was nothing in front of the cases (50A). The pipes were in bundles and were piled about 4 feet high and were not stowed evenly; they were more like a pyramid and the top was not even (51A). There was nothing between the pipe and the cases (69A). These cases were piled up to the upper tween deck (25A). When they started to work at about 8:20 A.M. the palletized cargo was first removed from the offshore side where the pipe and cases were stowed (55A, 74A) and at the time of the accident the hi-lo was about 15 feet away from the cases and plaintiff about 8 feet from them picking up dunnage that had been between palletized cargo (24A, 25A, 27A). Three cases fell on him. He did not nor did he see other longshoremen go near or touch the pipe or cases (26A).

Vosk, the hi-lo driver, also testified he didn't see any longshoreman touch or move the cargo that fell; he didn't come near it; and at the time of the accident his hi-lo was 15 to 20 feet away (79A). He identified the photographs in evidence as showing the cases that fell and the pipe (80A) but the photos were taken quite a while after the accident, after all other cargo had been removed

(84A). Some of the boards in the photos looked like part of the temporary fence between hatches #4 and #5 and some boards looked like chocks (86A) but when the cases fell they did not fall through this fence (93A).

Pratt said he was working in a different gang in #5 hatch behind the bulkhead fence separating #4 and #5 when the accident happened (95A). In addition to this fence there were two separation boards nailed into the cases and these boards came down at the time (96A). The photographs were taken at lunchtime between 12 and 1 P.M. when the men were out to lunch (103A). When the accident occurred, he obtained a 4 x 4 and also blocks to pry the cases off plaintiff which they did and the photographs show some of this lumber they used (103A).

Goch testified that the cases were up against the bulkhead fence; that there were no chocks bracing cargo to the pipe or chocks running to the cases and pipe and there was no fencing in front of the cases (111A-112A). The palletized cargo extended right over to the place where these four cases were piled and some were stowed against the 4 cases (115a). The hi-lo was 15 feet away at the time of the accident and prior thereto no-one touched either the pipe or the cases (112A-113A). They worked removing the palletized cargo for one-half hour before the accident occurred (115A). Three cases fell on top of plaintiff and one brushed him (111A).

Menosky testified that he saw the cases toppling over; no-one touched them and the ship was not swaying at the time; there was no fence in front of the cases and the cases on the pipe were not chocked or braced on top of the pipe; no-one touched the pipe or cases from the time they started working at 8:30 to the time of the accident at 9. Plaintiff was the one nearest the cases, about 6 feet away (200A-202A).

The deposition of the Chief Officer Gonzalez showed that it was part of his job to supervise the work of the longshoremen to see that they discharged the vessel properly (142A); and the longshoremen started discharging at 8:30 A.M. and the accident took place 40 minutes later at 9:10 A.M. (127A-129A).

Capt. Wheeler who testified on shipowner's behalf as an expert stated that if you have pipes and cases on it and then you stow cargo against it, you don't need shoring because the cargo blocks or chocks out the pipe and cases (343A-344A); that when the stevedore removed the first tier of drafts that were blocking the cases on top of the pipe, the cases were exposed to the risk of falling and at that moment something should have been done to shore, brace or lash the cargo or move or remove some of it (365A). He considered the pile of four cases to be unstable and potentially unsafe (366A, 367A). The "potential" was explained to mean that if sufficiently unbalanced it would fall immediately upon removal of lateral support but if not, the cases would stand until some "force" acted on it. The force was vibrations like simple running of the forklift in the area and that would be enough to dislodge cases (366A, 378A-379A). His interpretation of the photographs in evidence was that Exhibit 7 showing boards under cases was not shoring and not a cargo fence but the remains of the temporary bulkhead (349A-351A). When the photos were taken all cargo had been removed except for the four cases and the bulkhead was torn down when the cargo was discharged. The four cases in the photograph and on planks were at that time in Hatch #5 (370A, 371A). There were 2 large similar cases and 2 somewhat smaller ones involved; one large case weighed 1230 pounds (358A-359A). The palletized cargo was constructed to be handled with a hi-lo or forklift (327A).

Pinto who testified on behalf of the stevedore and who was their Safety Man stated that at 7:30 A.M., March 30, 1971, the day before the accident, he was in the hatch and saw four cases stowed on pipe, shored up and secured and looked safe (394A). There was palletized cargo about 18 inches from the cases (395A). A piece of shoring was nailed to the cases (396A). From his investigation he determined that "*due to the transit of the ship*" *the shoring was loosened and gave way when the cases came down.*

> Q. The cases broke the shoring right apart? A. Yes. The cases went right against the shoring and it came right apart.
>
> Q. Then the cases toppled on top of DeMauro? A. That's right (408A).

In his report which he made, he stated, "While discharging cargo in the wing the *cargo gave way and broke through the shoring and fell* on man's leg *due to latent defect* of stowage" (409A). And he was asked:

> Q. Am I correct that you are saying looking at the way that cargo was stowed, Mr. DeMauro or any other longshoreman working there would have no idea that the cargo would fall down? A. Absolutely (409A).
>
> Q. You said on direct examination that in your opinion the falling of the cases of cargo was due to the transit of the ship is that correct? A. Yes, I stated that (411A-412A).

Keeler, who testified for stevedore as an expert, stated that cases stowed on pipe as here were unstable and vibrations from operating a forklift would be enough to cause a big case to fall which it wouldn't do if the cases were really stable (436A-437A); that there is nothing stable about little bundles of pipe of different sizes and differ-

ent weights and, therefore did not give a stable base (423A-424A). Even though the bundles of pipe were banded, the pipes moved in the bundle, rotated, and the bundles changed shape. The vibrations of a ship causes this movement of pipe and change of shape of bundles (460A). Cargo is not supposed to fall and if it does without being removed, touched or dislodged by anything, it is not a proper stow (447A). If unstable enough to fall, the cases were defectively stowed (465A). In his opinion, the proper manner of stowing the cases was one case on top of pipe, next case on deck alongside making a width of two cases and putting the other two cases on top of the first two cases instead of four cases one on top of the other as here (421A); you had to make an even stable base out of the pipe before the cases were put on them and this could have been done by using dunnage to build up the edge of the pipe which was low and slanted (421A-422A); and when four cases were tiered four high there was absolute need for a fencing to go across to keep them on top of the pipe (422A). If palletized cargo was stowed up to the pipe and the first draft of the former which was removed was the one next to the pipe, that would remove lateral support for the cases and if this occurs, the cases should be removed or lowered to the deck (461A-462A).

POINT I

There was no question of fact for the jury to determine insofar as it pertained to the action by plaintiff against defendant shipowner on the grounds of unseaworthiness. Defendant's withdrawal of any defense or claim of contributory negligence left the court with no alternative but to direct a verdict in favor of the plaintiff.

From the facts testified to in this case, which are uncontradicted, reasonable men could come to but one conclusion—namely, that the vessel was unseaworthy. Hence, the direction of a verdict for the plaintiff was completely justified.

Four very heavy cases were stowed in one tier, one on top of the other and the tier was on top of bundles of mixed pipe. There was palletized cargo stowed from the bundles of pipe athwart ship. When plaintiff and his fellow workmen came to work in #4 hatch lower tween deck, on March 31, 1971, a hi-lo in the hatch used in the discharge operations first removed the palletized cargo alongside the pipe and then worked across the hatch. No one touched the cases, worked on or with them, or moved them. 30 to 40 minutes after the first tiers of palletized cargo were removed, the cases fell onto plaintiff who was 6 feet away.

The bundled pipe was described by all as uneven, sloped, shifting and the bundles would even change their shape by the movement of the individual pipe within a bundle. Shipowner's expert witness stated that he considered the pile of four cases to be unstable and as soon as the first tier of palletized cargo alongside the pipe was taken out, the lateral support was removed and the cases became "potentially" unsafe, explaining that by potential he

meant that if sufficiently unbalanced they would fall immediately, and if not, vibrations in the vessel like simple running of a hi-lo in the area would be enough to dislodge the cases. The stevedore's Safety Man testified that the shoring of the cases loosened in transit and when the cases came down the shoring did not hold. He testified there was a latent defect in cargo.

Stevedore's expert stated that the bundled pipe was not a stable base and the cases were unstable; it was not a proper stow and it was a defective stow; that the manner of stowing these cases was not proper, both by failure to make a proper stable base and because they tiered the cases four high.

Of course, the ship was unseaworthy because of the defective stow. The ship was just as unseaworthy whether as claimed by stevedore or its witnesses (1) there was a latent defect of stowage caused in transit which shoring loosened permitting falling cases to strike plaintiff or (2) the shoring was not adequate to contain the cargo when it fell, or (3) the cargo was unstable because it was placed on bundled pipe without making the base level and stable, or (4) the cargo was improperly stowed four high on the bundled pipe leaving the cases defectively stowed so that they could fall; or as claimed by shipowner, by their improper method of operation the longshoremen first removed the tier of palletized cargo closest to the pipe and cases thus removing lateral support making the cases unstable and permitting an unsafe condition to exist without doing something to shore up the cargo as required by the Safety and Health Regulations.

The stevedore seeks to apply legal principles pertaining to its third party case to plaintiff's case against the shipowner on unseaworthiness and hence stevedore's confusion.

In plaintiff's case against the shipowner no question of fault arises. The only question is whether there was an unsafe condition on board which proximately caused the injury to the plaintiff. Unseaworthiness is a condition and how that condition came into being, whether by negligence or otherwise, is irrelevant to the owner's liability for personal injuries resulting from it. Furthermore, the scope of unseaworthiness includes the method of loading her cargo or the manner of its stowage if same be improper and so the vessel not reasonably fit for her intended service. *Usner* v. *Luckenbach Overseas Corp.*, 400 U. S. 494.

It is settled law that seaworthiness of a vessel includes fitness for loading and unloading. Proper stowage is an element of seaworthiness. *Curtis* v. *A. Garcia Y Cia,* 2CA 241 F2d 30 (where a tier of bags collapsed). *Palazzola* v. *Pan Atlantic,* 211 F2d 277 2CA aff'd. 350 U. S. 124 (inadequately chocked roll of paper). *Rich* v. *Ellerman & Buckn. ll SS Co.*, 278 F2d 704 2CA (stepped on improperly supported cargo that titled).

Stevedore here argues that there was fencing or shoring which was supposed to contain the cargo but was not suitable for the purposes intended and it came apart when the cases fell; that because there is a claim made that there was no fencing but the cases became unstable and fell when the lateral support was removed, there is a question of fact for the jury to determine and hence there could be no direction of a verdict. Stevedore is wrong as, on both theories the vessel is unseaworthy and the only question remaining is between Shipowner and Stevedore as to whose fault it was that the accident occurred. That dispute has nothing to do with the proof necessary in plaintiff's claim against the Shipowner. As far as the plaintiff's case is concerned, the ship was unsafe and un-

seaworthy because the stow, its fencing, chocking, base, shoring support or bracing was not suitable or fit for its intended use. If there was no shoring, whether by way of lumber or blocking cargo, which all agreed was necessary, then the vessel was unseaworthy. Likewise, if there was shoring but inadequate or not functioning as intended, permitting the falling of cargo, then the vessel was likewise unseaworthy.

Thus, there is no genuine issue of fact in plaintiff's case against the Shipowner, and the Court was correct in directing a verdict in plaintiff's favor.

The argument is advanced by stevedore that the jury could have found that the cases fell because "some force exerted upon them for which the defendant was not responsible." This is specious. There is no proof of force exerted in this case. At the bottom of page 9 of their brief they refer to vibrations of a forklift could possibly cause these cases to fall; obviously any normal vibration of the ship under these conditions would also cause the cases to fall even though the ship was moored to a dock at the time of the accident. They then intone "instantaneous operational negligence of the stevedore would not make a vessel unseaworthy", citing *Usner*. How can any fair minded person say that a stow is proper and the ship seaworthy if heavy cases can fall as a result of any normal minor vibrations of a forklift or normal minor vibrations of a ship that is tied to a pier. The use of a forklift on board ship is usual, normal and customary activity which the shipowner knew about and actually required. Stevedore's expert testified that 80% of ship's cargo is palletized and requires the use of a hi-lo (472A). Defendant's expert testified that the palletized cargo was constructed to be handled by a hi-lo. So a hi-lo was necessarily used on the vessel.

And who says there is any proof of negligence on the part of a stevedore in the operation of a hi-lo on board the vessel. There was nothing negligent, unusual or improper to use a hi-lo to remove palletized cargo. Furthermore, Capt. Wheeler, defendant's expert, testified that the moment the lateral support was removed those cases were exposed to the risk of falling and something should have been done to correct that condition and if nothing were done for 30 minutes thereafter, the condition that was created would have been unsafe for all that time. So obviously the vessel in his view was unseaworthy during that 30 minute period.

In *Usner* v. *Luckenbach Overseas Corp.* (*supra*), it was held that there is no unseaworthiness if injury is caused by an isolated personal negligent act. We have none such here. What we do have is, in Shipowner's view of the facts, a dangerous and unsafe condition created by or permitted to exist by defendant for at least 30 to 40 minutes by their own admission, and possibly weeks before when the cargo was first stowed on the vessel.

Stevedore actually does not believe all it says in its brief. It took the following position at the time of trial:

"Sure an accident happened, by why did it happen? It happened because these cases were not properly stowed in the first place. If they were properly stowed in the first place, secured and chocked, the accident never would have happened." (519A).

"You heard all the witnesses in the case. But what does the whole thing boil down to? The whole thing boils down to a very simple question for you. Who is responsible for this accident, who should pay for the accident? Who was at fault? Who was negligent, who was responsible? And I say to you again, that the fault and the responsibility for this accident lies solely and only with the ship-

owner. It was their ship, their cargo, they stowed it, they didn't stow it properly, it wasn't shored or secured properly,——." (542A).

"The reason these things fell down is pure and simple. The shoring put there by stevedores on the West Coast hired by the shipowner wasn't good enough. Wasn't strong enough and broke and gave way and fell that is the only reason this accident happened——." (543A).

The stevedore now claims that the Court was in error in permitting the issue of negligence on the part of the defendant and contributory negligence on the part of the plaintiff to be withdrawn! Almost every time a case is tried the Court attempts to have plaintiff withdraw his claim for negligence and proceed with unseaworthiness. Are all the Courts in error if they permit such a withdrawal or is it only error when stevedore wishes to designate it as such. Also, in this case the defendant shipowner withdrew its defense of contributory negligence because "there does not appear to be any evidence that Mr. DeMauro himself personally was negligent." (506A). This was done at a time when the shipowner did not know what the outcome of the third party case would be. The stevedore was just as happy with the withdrawal, since a finding of contributory negligence on the part of the plaintiff would have been imputed to them. Now that the jury found against the Stevedore, they are complaining. There is no contributory negligence here and as between the plaintiff and the defendant that is not an issue.

To follow stevedore's argument one imagines there could never be a directed verdict. Fortunately that is not so.

In *D'Amico* v. *Lloyd Brasiliero Patrinonic Nationale* v. *American Stevedores Inc.*, 354 F2d 33 2C.A., a gantline holding a rain tent broke and the tent fell injuring the

plaintiff. The lower court directed a verdict against the shipowner on the issue of unseaworthiness, dismissed the third party complaint and submitted the question of damages to the jury. The ship's crew rigged the lines. The Hatch Boss and at least one other longshoreman examined the gantline visually before the tent was raised and found it in good condition without any fraying or being chewed up. The end of the gantline was then tied to the ring at the top of the tent. D'Amico, who was operating the up and down winch raised the tent above the hatch and then lowered it into position. Cargo operations were performed thereafter for 45 minutes when the gantline parted and the heavy tent fell hitting D'Amico. This plaintiff abandoned his claim of negligence and no claim of contributory negligence was asserted. The Court stated (p. 34): "We are urged to reverse, however, principally because of what we feel compelled to regard as a fictitious and unreal issue said to arise out of a snapshot photograph of a piece of rope that was received in evidence as Exhibit A, and the rejection of certain alleged expert testimony based on this exhibit." Shipowner claimed the rope was cut by the up and down fall. A witness testified the rope in the photograph looked like the rope in question. The Circuit Court held the photograph was an insufficient basis for expert's opinion stating that there was not a shred of evidence in the case to support such speculation and affirmed the lower court.

In our case there is also a fictitious and unreal issue raised by the defendant involving a photograph. The photographs in evidence were introduced for the purpose of identifying, more or less, what the cases looked like and the pipe they had been standing on. These photographs were taken approximately three hours after the accident after all the cargo had been removed from both hatches #4 and 5 and after the bulkhead fence had been

torn down. Capt. Wheeler testified that the photographs show the next hatch, i.e. Hatch #5, with lumber and cases scattered thereon, and when pressed as to whether the lumber there could have been used for shoring, he answered in the affirmative but thought it was too expensive a type of wood to be used for shoring and rather it was part of fencing or could have been used for fencing material.

Pratt who was the only one working in Hatch #5 testified that when he heard the cases fall in Hatch #4 the bulkhead fence had not come down. He also stated that some of that lumber that was on the floor had been brought over by himself and other longshoremen in his gang to use them as wedges and to pry the cases off the plaintiff. Despite this, the stevedore repetitively points to the photographs saying they show the cases on top of the lumber which was shoring and, therefore, the shoring came down and these cases on top of them. This is fictitious and misleading. Their Safety Man testified that when the accident occurred he was with someone else on another vessel and after he was found and notified of the occurrence, he then went over to the hatch and that is the way he saw the cases and lumber in the hatch. He admitted, however, that it took him three-fourths of an hour from the time he was informed of the accident to the time he got to the hatch. So that obviously the claim made with respect to fencing is of no probative value when based on these photographs and furthermore as heretofore set forth, even if stevedores claim were correct it goes to a question of fault and not to a question of condition or unseaworthiness. It should also be pointed out that much is made of an alleged space of 18 inches between the cases and the palletized cargo. The only one who raised a question of 18" space was the Safety Man who claimed that space between

the cases and the palletized cargo. It was he who reported a latent defect in stowage.

Nor is the direction of a verdict so prohibitive a concept as stevedore tries to convey. In speaking of a directed verdict, Judge Hand said in *Dyre* v. *MacDougall,* 201 F2d 265 2CA ". . . although it is . . . true that in strict theory a party having the affirmative might succeed in convincing a jury of the truth of his allegation in spite of the fact that all witnesses deny him, we think it plain that a verdict would nevertheless have to be directed against him." In *Brady* v. *Southern Railroad,* 320 U. S. 476, the Court stated:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

Nor are the cases cited by the stevedore pertaining to the directed verdict of much help to them. They make much of a very recent decision in *Tobin* v. *Slutsky,* No. 31, Sept. Term 1974 (Docket 74-1179). That case has nothing to do with ours and is an attempt by the Court to interpret the law of innkeepers under the New York Law. There is no relevancy to our case.

To summarize, in plaintiff's action an unsafe condition is claimed, proved, agreed to, testified to by all parties and is admitted by all. The stow was unstable, its base of bundled pipe was unstable, insecure and non-supportive

and cases fell without any intercession by the acts of anyone. Usual vibrations found on board ships was sufficient to cause the collapse of the stow. It is not a question of fault or negligence. Third party defendant stevedore attempts to translate and introduce fault concepts in a suit for unseaworthiness. The defendant shipowner admitted plaintiff was not contributorily negligent and withdrew the claim. The directed verdict was a just verdict and it prevented a possible miscarriage of justice.

POINT II

The award of Two Hundred Thousand ($200,000.00) Dollars was at best adequate and in no way excessive.

Plaintiff was struck by three falling cases; two of which weighed 1200 pounds each. He sustained a fracture of the femur and fibula and was hospitalized for 24 days immediately following the accident. At the hospital, in order to treat the fracture of the femur, it was necessary to drive a Kuntscher nail, at least 18 inches in length, into and through his thigh bone to promote proper healing of the fracture. About a year after the open reduction at the hospital, it was necessary for the plaintiff to be readmitted to the hospital for a week so that the Kuntscher nail could be removed from his leg. Aside from the surgical intervention and removal of the nail, plaintiff received no treatment whatsoever.

On April 27, 1972, plaintiff attempted to go back to work but could not continue because of severe pain in his thigh and leg and severe limitation of motion. Except for this one day, plaintiff has been totally disabled and according to doctors produced on plaintiff's behalf, will be totally disabled from longshore work. The fracture of the thigh bone healed well, but because plaintiff never received any

therapy, exercises or rehabilitation treatment, the muscles in his leg, and in particular quadriceps muscles permanently atrophied, and, according to Dr. Seaman, the condition could not be corrected. To quote page 170, lines 10-20:

> "The quadriceps mechanism is his present problem. It is weak. It cannot be significantly improved by even a very prolonged series of exercises and I feel that this is his problem. He will not be able to climb ladders or descend or use stairs for prolonged periods. He can bend a little but with a knee like this, if he has to bend a great deal it will cause him so much pain that he wouldn't be able to do it for a long time, once or twice or ten times he can do it—not all day."

Dr. Seaman also testified that there were very few manual jobs plaintiff could do. He said he could be a jeweler.

Dr. Graubard testified that plaintiff had sustained a permanent partial loss of use of 45% of his leg. He further testified, page 222, lines 13-21:

> "Well, he couldn't work in the hold and to work on deck, which is not an even type of a place to work in, which he would have to be able to get about the gear, the wires, the cables, etc., I wouldn't think he was capable of doing that because he would be working on an uneven surface. As far as working on the deck, he would have to be able to bend, put on the hooks, etc. especially where the nets are concerned. He would have to be capable of doing that work. I don't think he is capable of doing that."

Third party defendant's doctor, Dr. Andrioli, who was produced by defendant, found some mythical cardiosymp-

tomology which was not reflected in the hospital records or any doctors report either prior or subsequent to Dr. Andrioli's examination. In fact, Dr. Tagliagambe, third party defendant's doctor, who was also produced by defendant and who examined plaintiff over a year later, found no such symptomology.

Plaintiff placed in evidence W-2 forms which indicated that in 1969 plaintiff earned about $9,000.00 and in 1970 about $7,164.00. In 1970 plaintiff received disability benefits from the union for an attack of gout for several months which condition cleared up.

Plaintiff also offered into evidence the New York Ship- in this record an award of $450,000.00 would be reasonable for years 1960-73 which was received. This record shows that as of October 1, 1973, longshoremen who were able to work and were badged in for work were guaranteed a salary of $238. per week whether work was available or not.

For the years prior, the pay scale was somewhat lower but went up each year. As of the date of trial, plaintiff's loss of earnings amounted to $32,039. His future loss of service to expected working age of 65 is $322,768.00, without taking any future increases in pay into account. The medical expense was $5,409.00. Past, present and future pain and suffering and permanency of injury were left to the jury to determine.

The jury was given specific instructions on mitigation of damages. They fully and fairly considered the testimony of all of the medical witnesses as well as the plaintiff. They had an opportunity to observe these witnesses to determine their credibility. After due deliberation, the jury decided that $200,000.000 was an appropriate amount of damages in this case.

Third party defendant then made a motion for entry of judgment non-obstante redicto or entry of an Order setting aside the verdict and directing a new trial. In deciding this motion Judge Cannella stated at page 624(a):

> "The court finds that the verdict reached is not against the weight of the evidence adduced at trial, and that the damages assessed are not excessive."

Third party defendant has already had an opportunity to convince both the judge and jury of its position. Having failed with both they once again are attempting, with the same evidence to assert that the award of damages was improper.

It is respectfully submitted that based on the evidence ping Association contract wage scale for Longshoremen and would not be excessive.

The jury verdict of $200,000.00 being fully fair and reasonable should be sustained.

CONCLUSION

The verdict in plaintiff's fa[illegible] should be affirmed in all respects.

Respectfully submitted,

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Attorneys for Plaintiff-Appellee.

MORRIS CIZNER,
MARTIN LASSOFF,
of Counsel.

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Attorney for

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Attorney for TO

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